

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Petitioner,)	
)	
vs.)	
)	NO. CIV-06-1216-D
CARL DOWELL,)	
)	
Respondent.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

Petitioner brought this action pursuant to 18 U.S.C. § 4248, seeking the Court's determination that Respondent Carl Dowell ("Mr. Dowell") is a sexually dangerous person who, instead of being released following his incarceration, should be subject to mandatory civil commitment for mental treatment. Enacted as part of the Adam Walsh Child Protection and Safety Act of 2006 (the "Walsh Act"), § 4248 requires the civil commitment of certain individuals who are determined to be sexually dangerous to others. 18 U.S.C. § 4248(a). To order such commitment, the Court must conclude, after an evidentiary hearing at which the government bears the burden of proof by clear and convincing evidence, that an individual is a sexually dangerous person as defined by the Walsh Act. If a court finds that the government has satisfied that burden, the individual must be committed to a suitable facility for mental treatment until he is determined to no longer be sexually dangerous to others. 18 U. S. C. § 4248(d).

Pursuant to § 4247(d) of the Walsh Act, the Court conducted an evidentiary hearing in this case on January 3 and 4, 2008. At the hearing, numerous exhibits were admitted into evidence, and the Court heard the testimony of two forensic psychologists, Dr. Lela Demby and Dr. G. Richard Kishur. Also testifying were Mr. Dowell, his wife, and his stepdaughter. At the conclusion of the

hearing, the Court took the matter under advisement, and the parties were authorized to submit revised proposed findings of fact and conclusions of law. The parties' submissions have now been filed and reviewed by the Court. Having fully considered the evidence and governing law, the Court enters its findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Mr. Dowell was convicted by a federal jury in August 1985 of four counts: Rape, Carnal Knowledge of a Female Under Sixteen, Causing Abuse to a Child under Eighteen, and Simple Assault; these charges were based on Mr. Dowell's November 1984 sexual assault of an eight-year-old girl who was the daughter of Mr. Dowell's friend.

2. Upon conviction, Mr. Dowell was sentenced to a twenty-year term of incarceration, with an original expiration date in December 2006.

3. At the time of his August 1985 conviction, Mr. Dowell had previously been convicted of two other sex-based offenses:

- a. April 1983, while stationed in Germany as a member of the United States Army, Mr. Dowell was found guilty of exposing himself and masturbating in view of school children and women passing by his apartment at various times between July 1981 and January 1982; and
- b. In April 1985, Mr. Dowell was convicted of Sexual Child Abuse in Maryland state court; the conviction was based on the court's finding that Mr. Dowell forced his six-year-old stepdaughter to watch pornographic videos and to kneel and masturbate his genitals; at that time, the stepdaughter also reported that Mr. Dowell had performed oral sex on her on two occasions and had threatened to spank her if she reported this

conduct to her mother. At the time of his 1985 federal conviction, Mr. Dowell was in state custody for this conviction.

4. Mr. Dowell was mandatorily released from federal custody in July of 1998.

5. After his July 1998 release, Mr. Dowell married Lee Dowell, whom he had met during his incarceration. Mrs. Dowell resides in Olive Branch, Mississippi.

6. Between 1998 and 2006 Mr. Dowell was paroled and rearrested on the following dates:

- a. In July 1998, he was released on mandatory conditions of release;
- b. In January 2001, his release was revoked because of positive drug screens and violations of his substance abuse treatment requirement, and he was returned to custody;
- c. In July 2001, Mr. Dowell was again paroled and released;
- d. In September 2002, Mr. Dowell's release was revoked for positive drug screens and for failure to attend substance abuse and sex offender counseling sessions; he was returned to custody;
- e. In April 2003, Mr. Dowell was again paroled and released;
- f. In October 2003, Mr. Dowell's release was again revoked because of drug and treatment violations, and he was again placed in custody;
- g. In July 2004, he was again paroled and released;
- h. In September 2005, Mr. Dowell's release was again revoked because of positive drug screens and failure to participate in required treatment; he was again incarcerated;
- I. In April 2006, he was again released;
- j. In July, 2006, Mr. Dowell was returned to custody after his release was revoked

because of his drug use within one week of his prior release and because he failed to report for supervision.

7. Each time he was released from 1998 through April 2006, Mr. Dowell lived with Mrs. Dowell in Mississippi, where he has registered as a sex offender. *See* Respondent's Ex. 3. During these periods, he was occasionally employed.

8. During the time period from his initial release in 1998 through his most recent release in April 2006, there were no reports that Mr. Dowell engaged in child molestation or abuse or in any form of sexually violent conduct.

9. Mr. Dowell has been on release status for a cumulative total of approximately 44 months from December 1984 to the date of the hearing on January 3, 2008.

10. At the time of the hearing in this case, Mr. Dowell was 53 years old.

11. While in Bureau of Prisons custody following his July 2006 parole revocation, Mr. Dowell executed an "Expedited Revocation Proposal" provided by the United States Parole Commission. The proposal was executed on October 27, 2006, and the Parole Commission issued an "Expedited Revocation" form on November 1, 2006. Pursuant to the Expedited Revocation form, all time spent by Mr. Dowell on mandatory release was credited to his sentence, and his sentence would "continue to expiration."

12. On November 3, 2006, the Certification Review Panel of the Bureau of Prisons, headed by Dr. William T. Bickart, convened and certified Mr. Dowell as a "sexually dangerous person" in accordance with 18 U.S.C. § 4248(a). Dr. Bickart certified that "Mr. Dowell is a sexually dangerous person as defined by 18 U.S.C. § 4247(a)(5), and sexually dangerous to others as defined by 18 U.S.C. § 4247(a)(6)."

13. Upon receipt of the certificate, as authorized by § 4248(a) of the Walsh Act, the United States Attorney for the Western District of Oklahoma filed this action, seeking the Court's determination that Mr. Dowell is a sexually dangerous person as defined by the Act.

14. As a result of the certificate filed by Dr. Bickart, Mr. Dowell's release has been stayed as required by 18 U.S.C. § 4248(a), and he has remained in the custody of the Bureau of Prisons.

15. Following the filing of this action, the Court ordered a psychiatric or psychological examination of Mr. Dowell, as authorized by § 4248(b) of the Act; pursuant to that provision, the Court also directed that a report of the examination be filed in this action.

16. The psychological examination ordered by the Court was conducted by Dr. Lela Demby, the Sex Offender Forensic Psychologist for the Bureau of Prisons at the Federal Correctional Institution in Butner, North Carolina, ("FCI – Butner"), which the Bureau of Prisons has designated as a center for the evaluation and treatment of sex offenders. Following her examination of Mr. Dowell, Dr. Demby prepared a Forensic Report; her report was filed with the Court and admitted at the hearing as Petitioner's Exhibit 2 ("Demby Report").

17. Following the receipt of the Demby Report, Mr. Dowell asked the Court to authorize him to retain a psychologist to conduct an examination on his behalf; the Court granted that request, and Mr. Dowell retained Dr. G. Richard Kishur, a forensic psychologist in private practice who has extensive experience in treating sex offenders. Dr. Kishur prepared a written report of his evaluation of Mr. Dowell; his report was filed with the Court and admitted at the hearing as Dowell Exhibit 1 ("Kishur Report").

18. The parties do not challenge the qualifications of Dr. Demby or Dr. Kishur to offer expert testimony in connection with their respective forensic psychological evaluations of Mr.

Dowell. Accordingly, the Court need not discuss their respective qualifications, but notes that each has submitted a curriculum vitae establishing that Drs. Demby and Kishur are extremely well qualified by education and experience to offer their opinions regarding whether Mr. Dowell is a sexually dangerous person as defined by the Walsh Act. A copy of Dr. Demby's curriculum vitae was admitted at the hearing as Petitioner's Exhibit 7, and Dr. Kishur's curriculum vitae was admitted as Respondent's Exhibit 1B.

19. In connection with her evaluation of Mr. Dowell, Dr. Demby reviewed a significant amount of material, including his Bureau of Prisons central file, the U. S. Parole Commission file, and the available police reports regarding his prior convictions. Mr. Dowell's Bureau of Prisons file, submitted as Petitioner's Exhibit 1, reflects no incidents of exhibitionism or sexual misconduct during his incarceration from 1985 through 1998. There are also no reports of exhibitionism or sexual misconduct during his subsequent returns to custody after his parole violations from 1998 to the present. Dr. Demby also acknowledged that Mr. Dowell's Bureau of Prisons file reflects an overall positive record as an inmate; he earned his GED within two years of his 1985 incarceration, and he successfully completed training programs. He had only two disciplinary infractions during his incarceration from 1985 to the present, and neither involved sexual conduct of any type. His prison work records were also good. Mr. Dowell has a very good institutional record, according to Dr. Demby.

20. Dr. Demby testified that she met with Mr. Dowell five times, and interviewed him for a total of approximately four and one-half hours. She administered a diagnostic test, the Minnesota Multiphasic Personality Inventory, Second Edition ("MMPI-2"), which she described as "an assessment of personality characteristics and overall level of emotional adjustment" consisting of 567

true-false questions. Demby Report, p. 12.

21. Based on the foregoing interviews, her review of documents, and the MMPI-2 results, Dr. Demby determined that, by application of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (“DSM-IV”), the following current diagnoses apply to Mr. Dowell:

Axis I:	302.2 Pedophilia, Sexually Attracted to Females, Nonexclusive Type
	302.4 Exhibitionism
	303.90 Alcohol Dependence, in a Controlled Environment
	305.60 Cocaine Abuse
	305.20 Cannabis Abuse
	305.50 Opioid Abuse (heroin)
Axis II:	301.7 Antisocial Personality Disorder
Axis III:	None
Axis IV:	Interactions with the legal system
Axis V:	Current GAF: 80

Demby Report, p. 13.

22. Dr. Demby testified that Mr. Dowell’s history reflects that he initially denied engaging in the conduct for which he was incarcerated in 1984 and 1985, and his responses to her questions during personal interviews reflected his desire to place himself in an overly positive light. She concluded that he was not entirely forthcoming in his responses and that she perceived a pattern of denial by Mr. Dowell.

23. Dr. Demby also was aware that, during Mr. Dowell’s period of incarceration, the Bureau of Prisons administered several psychological evaluations. These documents were admitted into evidence as Respondent’s Exhibit 5. Five documents are entitled “Psychological Services Intake Screening Summary;” these were prepared on five occasions from 1995 through 2003, and reflect evaluations conducted when Mr. Dowell was transferred to different Bureau of Prisons

facilities. A sixth evaluation is also included in Respondent's Exhibit 5; it is entitled "Federal Bureau of Prisons Psychology Data System," and bears the notation of "09-01-2005 - Intake Screening." These six documents do not include any recommendation for psychological counseling or treatment for sexual misconduct; and Mr. Dowell was not referred for mental health counseling on any of these occasions. Indeed, five of the documents reflect a determination of no significant acute psychological issues regarding Mr. Dowell.

24. In her evaluation of Mr. Dowell, Dr. Demby also utilized several actuarial assessment methods which are designed to assess an individual's risk of sexual recidivism. The actuarial tools utilized include: a) the Static-99, described as an actuarial instrument designed to "estimate the probability of sexual and violent recidivism among males who have already been charged or convicted of at least one sexual offense against a child or non-consenting adult;" b) the Rapid Risk Assessment for Sex Offense Recidivism ("RRASOR"), which consists of "four variables comprising both a risk assessment instrument on their own, and four of the ten variables on the Static-99;" c) the Minnesota Screening Tool for Sex Offenders-Revised ("MnSOST-R"), a 16-item instrument developed by the Minnesota Department of Corrections to assess sex offenders for possible civil commitment under Minnesota's sexual predator laws; and d) the Hare Psychopathy Checklist ("PCL-R"), a 20-item clinical rating scale used to assess a profile of behaviors and personality traits related to a "widely understood clinical conception of psychopathy in male forensic populations." Demby Report, pp. 16-17.

25. On the Static-99 instrument, Mr. Dowell's score was eight on a scale of zero to twelve; according to Dr. Demby a score of eight is associated with a 57% rate of detected sexual reoffending within the first 15 years. Demby Report, p 16. That percentage is based on the Static-99 Coding

Rules Revised-2003, a copy of which was admitted as Court Exhibit 1. The authors of the Static-99 Coding Rules state that the Static-99 “demonstrates only moderate predictive accuracy.” Court Ex. 1, p. 3.

26. Dr. Demby reported that Mr. Dowell scored a four on the RRASOR instrument, which has a score range of zero to six; that score is associated with a 48.6% risk of reoffending within a ten-year period. Demby Report, p. 16. The RRASOR instrument has a margin of error of $\pm 8.3\%$.

27. According to Dr. Demby, the MnSOST-R measures the risk of recidivism based on twelve static or unchangeable factors and four dynamic or changeable factors. The range of scores for the MnSOST-R is -16 to +31; Mr. Dowell scored a 15, which is in the high range, according to Dr. Demby. The percentage of recidivism resulting from test scores on the MnSOST-R varies according to the “base rate” utilized; the instrument measures recidivism rates for a 35% estimated base rate, a 21% estimated base rate, and a 15% estimated base rate. Comparing Mr. Dowell’s score of 15 to other offenders having that score, there was an 88% rate of reoffending if a 35% estimated base applies; 78% of those having a score of 15 reoffended if a 21% base rate applied; and 70% reoffended if a 15% base rate applied. Dr. Demby concluded that, applying the most conservative base rate of 15%, Mr. Dowell’s risk of reoffending is high under the MnSOST-R analysis. Demby Report at pp. 16-17. The MnSOST-R has a margin of error of $\pm 18.3\%$.

28. Dr. Demby explained that the Hare Psychopathy Checklist (“PCL-R”) is a “20-item clinical rating scale used to assess a profile of behaviors and inferred personality traits related to a widely understood clinical conception of psychopathy in male forensic populations.” Demby Report at p. 17. It does not correlate directly with sexual reoffending; however, she states that a deviant sexual arousal pattern coupled with a high PCL-R score predicts sexual reoffending; a high

psychopathy rating also has been shown to predict treatment failure. On the PCL-R, Mr. Dowell scored a 30, which places him in the 77th percentile of male prison inmates. Dr. Demby also states that this score indicates that his “self-report” should be viewed with caution where it differs from his records because lying and manipulation are characteristics of psychopathy. *Id.* The PCL-R has a margin of error of ± 8 .

29. In addition to her evaluation of the diagnostic and risk assessment tests, Dr. Demby’s opinion is based on Mr. Dowell’s personal and criminal history, his failure to comply with past treatment, his chronic substance abuse, and his offense characteristics. She concludes that his two paraphilias (pedophilia and exhibitionism), four substance abuse diagnoses, and significant personality disorder, when combined with his scores on the risk assessment instruments, indicate “a very high risk of future sexual reoffense.” Demby Report, p. 19. Furthermore, his diagnoses of pedophilia, exhibitionism and anti-social personality disorder are “chronic, pervasive, and deeply ingrained;” thus, she concludes, he is a person suffering from a serious mental illness, abnormality, or disorder, as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation. *Id.*

30. Dr. Kishur examined Mr. Dowell and interviewed him for approximately four to five hours. Dr. Kishur reviewed Dr. Demby’s report and the diagnostic tests and risk assessment instruments she utilized in her evaluation of Mr. Dowell. Dr. Kishur agreed that the tests and assessment instruments utilized by Dr. Demby are appropriate means of diagnosing Mr. Dowell and of assessing the risk of recidivism. He did not undertake to re-administer these tests and did not express significant disagreement with the results (although his scoring of the PCL-R resulted in a score lower than 30). His disagreement with Dr. Demby’s conclusions is based primarily on the

application of the tests and assessments to Mr. Dowell without taking into consideration his observed behavior since 1985. Specifically, with respect to the DSM-IV, he indicated the diagnoses at Axis I of pedophilia and exhibitionism should be amended to note “by history,” as the incidents on which these findings are based occurred more than 20 years prior to the current diagnosis. Kishur Report, p. 12. Dr. Kishur also agreed that the results of the actuarial risk assessments administered by Dr. Demby shows that Mr. Dowell is in the “high risk range for sexual recidivism.” *Id.*, p. 10. Dr. Kishur testified, however, that the statistical assessment must be considered in light of the other circumstances involving Mr. Dowell; in particular, Dr. Kishur noted the complete absence of any evidence of exhibitionism, child abuse, or child molestation since 1985, including the time periods in which he was not incarcerated. Dr. Kishur testified that circumstances particular to Mr. Dowell place his case outside the actuarial scheme, due to: 1) the significant length of time since Mr. Dowell’s last sexual offense and the failure of the actuarial tools to account for such elapsed time; and 2) the inclusion of the 1982 indecent exposure incident – which was a non-contact, non-violent offense not particularly targeted toward children – which distorts the actuarial conclusions. While both Dr. Kishur and Dr. Demby recognize that the probability of recidivism decreases with age, the data are apparently inconclusive regarding the extent of this decrease before age 60.¹ Dr. Kishur further opines that there is “no support in the psychological tests administered for assigning a current diagnosis of a major mental disorder in this case.” Kishur Report, p. 11. He agrees that Mr. Dowell has “characteristics, verified by the records reviewed, indicative of Antisocial Personality Disorder.” *Id.* However, he adds, “an antisocial personality is not the same as, and should not be confused with, psychopathy. The result of the PLC-R does not support psychopathy as a current disorder.”

¹Material contained within Court Exhibit 1, Static-99 Coding Rules, however, depicts a significant drop generally in sex offender recidivism beyond age 50. Mr. Dowell is 53 years old. *See* Court Ex. 3, p. 24.

Kishur Report, p. 11.

31. Dr. Kishur also disagreed with Dr. Demby's opinion that pedophilia and exhibitionism are chronic, life-long disorders. With respect to pedophilia in particular, he testified that mental health practitioners have recognized two categories: "fixated pedophilia," which appears to be chronic; and "situational pedophilia," which is transitory and less likely to result in reoffense. He noted that the DSM-IV indicates that pedophilia is not necessarily chronic. *See* DSM-IV § 302.2, Court Ex. 5.

32. Although he found the tests administered by Dr. Demby to be appropriate and useful, Dr. Kishur opined that other tests are the best means of determining if a person can properly be diagnosed as a current pedophile. One of these tools is the Abel Assessment for Sexual Interest ("AASI") test, which Dr. Kishur administered to Mr. Dowell. The test consists of a questionnaire and Visual Reaction Time Test administered to the subject individual; the data obtained in the test is submitted online to the Abel Screening, Inc. Data Center ("Abel Data Center"), which evaluates the data in a proprietary computer program and then develops a report. In this case, Dr. Kishur administered the test to Mr. Dowell using a lap-top computer. In the Visual Reaction Time component of the test, Mr. Dowell was shown a series of images designed to measure his sexual reaction to preschool, grade school, adolescent, and adult males and females. Kishur Report, pp. 7-8. According to the results as evaluated by the Abel Data Center², Mr. Dowell showed no sexual interest in pre-school or grade-school females. He showed sexual interest only in adult females and

²Dr. Kishur could not explain the precise manner in which the Visual Reaction Time Test is evaluated by the Abel Data Center because all aspects of the electronic data input and report are regarded by Abel Screening, Inc. as proprietary information; thus, the on-site administrator of the test is not provided with this information. Instead, the test data are transmitted electronically to the Abel Data Center, which evaluates the results by means of a computer program; the resulting evaluation is electronically transmitted to the on-site administrator of the test in a computer report.

adolescent females having adult physical characteristics. According to Dr. Kishur, the “objective measures of sexual interest indicate that Mr. Dowell does not have a distorted sexual interest pattern” at the present time. *Id.*, p. 8. The AASI test has a margin of error of +/- 21-22%, but according to Dr. Kishur, because Mr. Dowell’s score was near the top of the range for interest in adult and adolescent females the margin of error does not significantly impact the test results regarding Mr Dowell.

33. Dr. Kishur testified that, although the AASI is not specifically designed to measure the risk of recidivism, its measurement of current deviant sexual interest (or “arousal patterns”), combined with other assessment tools, is used to assess the risk of recidivism. However, Dr. Kishur believes that the most effective method of accurately measuring current deviant sexual interest is Penile Plethysmography (“PPG”). A PPG test is administered by attaching a device to the individual’s penis, and it measures the degree of arousal in response to images shown to him. In Dr. Kishur’s opinion, a PPG is the most effective means of measuring current deviant interest, and the AASI is the next best method of measurement. He would have preferred to administer a PPG to Mr. Dowell but was unable to do so because the equipment is not portable, and there was no PPG equipment at the Grady County, Oklahoma jail where he interviewed and evaluated Mr. Dowell.

34. Dr. Demby confirmed that PPG equipment is available at FCI – Butner, where she interviewed and evaluated Mr. Dowell. She testified that a PPG was not administered to Mr. Dowell, and that it is typically not used by the government for forensic evaluations. She also noted that the subject must volunteer to undergo the PPG. According to Dr. Demby, the PPG test is not infallible, but can be helpful. There is no evidence in the record suggesting that Mr. Dowell was

asked whether he would submit to a PPG test.

35. Dr. Demby also testified that the AASI can be a useful evaluation method. Although she is not particularly experienced regarding the AASI, she questions its validity in situations in which the subject being tested is not forthcoming with his responses to the questionnaire, which she believes would make the AASI less reliable in Mr. Dowell's case because of his previous tendency to deny his past behavior. Dr. Kishur, however, testified that the visual portion of the AASI is beyond the subject's ability to manipulate.

36. As reflected above, the expert testimony in this case is conflicting. In summary, Dr. Demby, a highly qualified and competent psychologist, concluded that the diagnosis of Mr. Dowell – based in large part on his conduct over twenty years ago – holds true today. Dr. Demby opined that Mr. Dowell's mental disorders, namely pedophilia and exhibitionism, do not go away over time but can be managed if treatment is successful. Her diagnosis of Mr. Dowell, combined with the actuarial tools which she asserts suggest that Mr. Dowell is a high risk for recidivism, lead her to conclude that Mr. Dowell is a sexually dangerous person and thus meets the criteria for commitment under § 4247.

37. On the other hand, Dr. Kishur, also a highly qualified and competent psychologist, concluded that the historical diagnosis based on conduct from 1981 and 1984 is no longer viable. Dr. Kishur opined that the pedophilia disorder is not necessarily a chronic, life-long disorder, and that he found nothing to support a conclusion that Mr. Dowell currently suffers from pedophilia or exhibitionism. Dr. Kishur relies, *inter alia*, on the fact that, throughout Mr. Dowell's over twenty years of incarceration and over three-and-a-half years of time on release within the community, no evidence suggests that Mr. Dowell has committed any acts of sexual misconduct. Dr. Kishur

discounts the actuarial tools, citing their significant margins of error and rigid inability to take into account a number of variables specifically relevant to Mr. Dowell. Significantly, Dr. Kishur also relies heavily on the results of the AASI test he administered to Mr. Dowell, which, Dr. Kishur is convinced, demonstrates that Mr. Dowell currently does not experience deviant sexual arousal patterns. The AASI test establishes, according to the test's creator and Dr. Kishur, that Mr. Dowell is sexually attracted to adult and adolescent females – an arousal pattern that both Dr. Kishur and Dr. Demby agree is normal. Thus, Dr. Kishur concludes that Mr. Dowell is not currently a sexually dangerous person, and does not meet the statutory criteria for commitment.

38. Dr. Kishur's opinion – not shared by Dr. Demby – that pedophilia is not always a chronic, life-long disorder, appears to be recognized in the DSM- IV which states in part: "The frequency of pedophilic behavior often fluctuates with psychosocial stress. The course is usually chronic, especially in those attracted to males."³

39. The only psychological test administered to Mr. Dowell which sought to determine his current sexual arousal patterns was the AASI test administered by Dr. Kishur. As noted, this test, according to Dr. Kishur, establishes that Mr. Dowell currently experiences normal sexual arousal patterns. Dr. Demby testified that the similar, and perhaps more reliable PPG test, was available to the government but was not administered to Mr. Dowell. Dr. Demby's only explanation for why the PPG was not administered regarding Mr. Dowell was that it is not normally a part of the government's evaluation process in these cases.

40. Dr. Kishur testified that he is convinced the AASI was properly administered to Mr.

³*See DSM-IV, § 302.2, Pedophilia (emphasis added). Mr. Dowell's disorder was diagnosed as one which focused on females. This portion of the DSM-IV was submitted by the parties, at the request of the Court, as a part of the DSM-IV material which they agree is relevant to the issues in this case. The DSM-IV material designated by the parties was admitted into evidence as Court Exhibit 5.*

Dowell, and the results are valid. Dr. Kishur has administered the test hundreds of times.

41. Dr. Kishur also relies heavily on the observed experience regarding Mr. Dowell during periods of his release in the community. In this regard the testimony of Mr. Dowell's wife and step-daughter is important. Mrs. Lee Dowell testified that she met Mr. Dowell in 1994 while visiting another inmate at the facility where Mr. Dowell was incarcerated. She continued to visit him and, after his 1998 release, they were married. Mrs. Dowell reported a normal sexual relationship with Mr. Dowell that is mutually gratifying. Prior to their marriage, Mr. Dowell told her he had been convicted of child molestation; however, he did not tell her all of the details, and she did not know the age of the children he molested. According to Mrs. Dowell, he expressed sorrow and regret about his past conduct.

42. At the time of her marriage to Mr. Dowell, Mrs. Dowell had two granddaughters, ages four and eight, who resided with their mother, Laquita Arnold. At that time Ms. Arnold and her daughters resided in a community near the Dowells' residence; they also currently reside nearby. Mrs. Dowell testified that she has never seen Mr. Dowell engage in any inappropriate behavior involving her granddaughters. She also testified that the granddaughters, who are now 14 and 18 years old, have never reported that Mr. Dowell has acted improperly or said or done anything that would cause her concern. According to Mrs. Dowell, the granddaughters have been told that they must report inappropriate behavior by anyone. She testified that child molestation is of particular concern to her because her daughter (Laquita Arnold) was molested as a child, and both she and her daughter have taught the granddaughters to be aware of such behavior and report it immediately. Mrs. Dowell believes that, if Mr. Dowell had engaged in any inappropriate behavior, the granddaughters would have told their mother or Mrs. Dowell. As an example of the girls'

willingness to do so, she recalled an incident in which one of the girls telephoned Ms. Arnold at work to report that a neighbor had acted improperly toward her.

43. Laquita Arnold testified that, prior to her mother's 1998 marriage to Mr. Dowell, he told Ms. Arnold about his conviction for child molestation. Child molestation is a sensitive issue for Ms. Arnold because she was molested as a child. Because of her experience and the fact that she had two small daughters, she was initially hesitant about her mother's relationship with Mr. Dowell. However, Ms. Arnold testified that she became comfortable after she observed him, and he expressed remorse about his past behavior. Ms. Arnold also testified that, because she was molested as a child, she made sure her daughters were well aware of what can happen and what molestation means; she had discussed this with them before she met Mr. Dowell. During the years she has known Mr. Dowell, she has never seen him engage in any behavior that she would regard as inappropriate toward her daughters or toward anyone else. She has never seen him engage in sexually violent conduct toward anyone. Her daughters have never exhibited any unusual behavior after being in Mr. Dowell's presence, and she has no concerns about them spending time with him.

44. Although Ms. Arnold is aware of Mr. Dowell's drug use, this has not caused her concern because she has never seen him engage in any conduct that would cause her to be worried about the safety of her children. She believes that child molesters should be prosecuted, and she would not hesitate to take action if she suspected that molestation occurred.

45. The Petitioner emphasized a purported lack of remorse by Mr. Dowell for past actions, and a related failure to accept responsibility for, and denial of, past conduct. Indeed, these traits were significant to Dr. Demby's ultimate opinion. Mr. Dowell was called as a witness by Petitioner (over objection by Respondent's counsel). In his testimony he substantially admitted his past sexual

misconduct as reflected in various reports, and he expressed remorse for such conduct. Mr. Dowell testified that he could not explain why he engaged in the previous sexual conduct for which he was incarcerated. With respect to exposing himself and masturbating in front of children in Germany in 1981 and 1982, he admitted that he was under the influence of drugs at that time. However, he denied having engaged in drug use prior to his sexual assaults on female children in 1984 and 1985. He denied having planned those assaults, and stated that he had no excuse for his conduct. Although he denied or did not recall some specific allegations regarding these incidents, he generally admitted that he engaged in the conduct.

46. Mr. Dowell also testified that he has not engaged in similar conduct since his incarceration in 1985 and that he has no sexual interest in prepubescent children. He testified that, throughout his confinement, he has attempted to understand how he could have ever engaged in such conduct. Although he testified that he was sexually attracted to young females at the time he committed the crimes, he asserts that he is no longer attracted to them, and has no sexual thoughts about prepubescent girls. He believes that his conduct on those occasions was wrong and he knows that he hurt the victims; he testified that he hopes they have had a good life, but he is concerned that they might not have overcome it. Mr. Dowell also testified that he believes his continued drug abuse during his several periods of release from incarceration was a method of punishing himself for his past conduct.

III. CONCLUSIONS OF LAW

1. 18 U.S.C. § 4248 authorizes the Attorney General of the United States or his designee to certify a person who falls into one of three statutory categories as a “sexually dangerous person.”

In this case, the parties agree that the only category applicable to Mr. Dowell is that he is a person in the custody of the Bureau of Prisons⁴.

2. The government has the burden of proving that Mr. Dowell is a “sexually dangerous person” as defined by the statute. To satisfy that burden, the government must prove: a) that Mr. Dowell “has engaged or attempted to engage in sexually violent conduct or child molestation;” b) that Mr. Dowell “suffers from a serious mental illness, abnormality, or disorder;” and c) that, as a result of that illness, abnormality or disorder, Mr. Dowell “would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” 18 U.S.C. § 4247(a)(5) and (6).

3. The government has the burden of proving the foregoing elements by “clear and convincing evidence.” 18 U.S.C. § 4747(d).

4. The Tenth Circuit does not have a pattern jury instruction defining “clear and convincing evidence.” However, model jury instructions from other accepted sources define clear and convincing evidence as “evidence that produces in your mind a firm belief or conviction as to the matter at issue.” *See* O’Malley, Grenig & Lee, *Federal Jury Practice and Instructions - Civil* § 104.02 (5th ed. 2000); Third Circuit Model Civil Jury Instructions, Instruction No. 1.11 (2006); Fifth Circuit Pattern Jury Instructions (Civil Cases), Instruction No. 2.14 (2006). The standard has also been defined as evidence that the question at issue is “highly probable.” *Federal Civil Jury Instructions of the Seventh Circuit*, Instruction No. 1.28 (2005); *Manual of Model Civil Jury*

⁴The statute provides three categories of individuals who may be subject to the Act: 1) a person who is in the custody of the Bureau of Prisons; 2) a person who has been committed to the custody of the Attorney General under 18 U. S. C. § 4241(d) based on incompetence to stand trial; or 3) a person against whom all criminal charges have been dismissed solely for reasons relating to his mental condition. 18 U. S. C. § 4248(a). The parties agree that the only category applicable to Respondent is the first category.

Instructions for the District Courts of the Ninth Circuit, Instruction No. 1.4 (2007). In this case, both parties referred to the burden as requiring evidence sufficient to establish a firm belief that the matter at issue is highly probable.

5. The Court finds that, with respect to the first element of proof, the government has met its burden because it is not disputed that Mr. Dowell has prior convictions establishing that he has “engaged or attempted to engage in sexually violent conduct or child molestation.”

6. With respect to the second required element, the government must prove that Mr. Dowell “suffers from a serious mental illness, abnormality, or disorder.” Mr. Dowell argues, and the government does not dispute, that this element requires clear and convincing proof that Mr. Dowell currently has a serious mental illness, abnormality, or disorder.

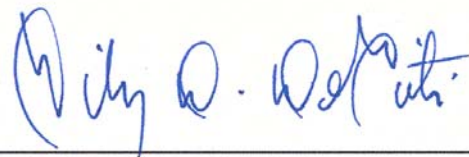
7. The sharply conflicting psychological expert testimony – including the results of the only administered test pertinent to detecting deviant sexual arousal patterns which demonstrates no current deviant arousal, the absence of any known sexual misconduct committed by Mr. Dowell during a period of over twenty years of incarceration and over three-and-a-half years in the community as a result of periods of early release, the unrefuted observations of Mr. Dowell’s wife and stepdaughter corroborating that Mr. Dowell has committed no sexual misconduct during periods of release, along with the other evidence and trial testimony, compel the conclusion that the proof in this case does not reflect a high probability that Mr. Dowell “suffers” from a serious mental illness, abnormality, or disorder and is currently a sexually dangerous person. Thus, the government has not met its statutory burden in this case with respect to the second requisite element of proof.

8. The third element of proof required is necessarily linked to the second element, as the government must prove that, “as a result of” a current serious mental illness, abnormality or

disorder, Mr. Dowell “would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” 18 U. S. C. § 4247(a)(6). Inasmuch as the government has not presented clear and convincing evidence that Mr. Dowell currently suffers from a serious mental illness, abnormality, or disorder, it cannot satisfy its burden of proving that, as a result of such current condition, he would have difficulty refraining from sexually violent conduct or child molestation.

9. Accordingly, the Court concludes that the government has not satisfied its burden of proving that Mr. Dowell is a sexually dangerous person, as defined by the Walsh Act; thus, he is not subject to the involuntary civil commitment for mental care and treatment provisions of 18 U. S. C. § 4248. Consequently, judgment shall be entered in favor of Mr. Dowell and against the government, and Mr. Dowell shall be released forthwith from the custody of the Bureau of Prisons.

IT IS SO ORDERED this 25th day of January, 2008.



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE